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**IN THE
COURT OF APPEALS OF INDIANA**

DEBRA KERN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 47A01-0706-CR-277

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William Sleva, Judge
Cause No. 47D02-0509-FC-748

April 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Debra Kern pled guilty to one count of trafficking with an inmate¹ as a Class C felony, and the trial court sentenced her to one year of incarceration and three years of supervised probation. Kern appeals her sentence, raising the following restated issues:

- I. Whether the trial court abused its discretion in its consideration of mitigating circumstances; and
- II. Whether her sentence was inappropriate in light of the nature of the offense and her character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 24, 2005, Kern addressed an envelope to her son at the Lawrence County Jail. Her son's girlfriend had given the envelope to her. Kern knew the envelope contained a crushed methadone pill and tobacco. Upon delivery, the jail staff discovered the contraband. Kern accepted responsibility for the envelope when confronted by police detectives.

The State charged Kern with two counts of trafficking with an inmate, one count as a Class C felony, and the other count as a Class A misdemeanor. On May 10, 2006, Kern pled guilty to trafficking with an inmate as a Class C felony. Pursuant to the plea agreement, the State agreed to dismiss Kern's remaining charge. The plea agreement stated that her executed sentence could not exceed two years. At the sentencing hearing, the trial court sentenced Kern to one year of incarceration and three years of supervised probation. Kern now appeals.

¹ See IC 35-44-3-9.

DISCUSSION AND DECISION

I. Abuse of Discretion

Kern argues the trial court abused its discretion in sentencing her because it failed to sufficiently address in its sentencing statement several mitigating circumstances raised and clearly present before the record. Namely, she asserts that the trial court failed to explain the impact of her lack of criminal history, her guilty plea, the undue hardship of incarceration on her and her family, her likeliness to respond well to probation or short-term incarceration, and her likeliness not to commit another crime.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)). If the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances and the reasonable inferences drawn therefrom. *Id.* Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Id.* This statement must include “a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence,” and “[i]f the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating.” *Id.* The trial court’s assignment of relative weight or value “to reasons properly found or those which should have been found is not subject to review for abuse.” *Id.* at 491.

When a defendant alleges that the trial court failed to identify a mitigating circumstance, he is required to establish that the mitigating evidence is both significant and clearly supported by the record. *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999). The trial court is not obligated to find the existence of mitigating factors. *Id.* “If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist.” *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993) (citing *Hammons v. State*, 493 N.E.2d 1250, 1254 (Ind. 1986)).

Here, the trial court’s sentencing statement acknowledges that Kern had “no prior history.” *Tr.* at 33. The trial court then points out that Kern’s first crime was sneaking methadone, “a serious drug,” to her incarcerated son, an action that “could have had dire consequences.” *Id.* It is apparent from the sentencing statement that the trial court considered Kern’s criminal history, but balanced it against the severity of her crime. Under *Anglemyer*, we do not review the weight given to her criminal history as a mitigating factor. 868 N.E.2d at 491.

Kern also asserts that the trial court failed to afford her mitigating benefits from her guilty plea and acceptance of responsibility for her actions. We “have recognized that a defendant who pleads guilty deserves to have mitigating weight extended to the guilty plea in return, but it is not automatically a significant mitigating factor.” *Blixt v. State*, 872 N.E.2d 149, 153 (Ind. Ct. App. 2007) (citing *Davis v. State*, 851 N.E.2d 1264, 1268 n.5 (Ind. Ct. App. 2006)). Here, the trial court accepted the plea and the plea agreement in its sentencing statement. *Tr.* at 33. Kern’s argument that she received no

mitigating benefits from her guilty plea is without merit. The trial court recognized the plea agreement's dismissal of the second count of trafficking with an inmate, a Class A misdemeanor, which carried a possible sentence of one year incarceration and a \$5,000 fine. *Id.* Kern also received the benefit of a sentencing cap of two years maximum executed time. *Id.* at 34. We find that the trial court properly considered Kern's guilty plea as a mitigating factor.

Kern also contends that the trial court failed to consider the undue hardship of incarceration on herself and her family. She cites her back pain and pleurisy. Here, the trial court stated its confidence in Kern's ability to receive medical assistance while incarcerated and confirmed that it would ask the jail to deal with those issues without delay. *Id.* While addressing her medical issues, the trial court stated Kern was sentenced to one year of incarceration. *Id.* In addressing Kern's medical condition and sentencing her to less than the maximum, it is clear the trial court afforded Kern's medical condition weight as a mitigating factor. Accordingly, we find that the trial court properly considered Kern's undue hardship as a mitigating factor.

Kern also argues that the trial court abused its discretion by failing to consider her likeliness to respond well to probation or short-term incarceration and failed to consider her propensity to not commit another crime as mitigating factors. To support her argument, she relies on a finding in the Pre-sentence Investigation Report that this mitigating factor applied to her. Here, we conclude that the trial court sufficiently considered Kern's likeliness to respond well to probation or short-term incarceration and unlikeliness to commit another crime as mitigating factors. It did so by sentencing Kern

to one year of incarceration, a full year less than the maximum it could have imposed under the plea agreement sentencing cap. *Tr.* at 34. Additionally, the trial court suspended three years of Kern's sentence to supervised probation. *Id.*

II. Inappropriate Sentence

We may revise a sentence after careful review of the trial court's decision if we conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). "Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate." *McMahon v. State*, 856 N.E.2d 743, 749 (Ind. Ct. App. 2006) (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)). Even if the trial court followed the appropriate procedure in arriving at its sentence, the appellate court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005).

Kern argues that her sentence of one year of incarceration and three years suspended to probation was inappropriate in light of the nature of the offense and her character. She maintains that her age and her medical conditions necessitate a lighter sentence. Kern points out that an assessment administered during the pre-sentence investigation process concluded she was of low to medium overall risk potential. She also strongly advocates for a reduced sentence based on her lack of criminal history preceding the current offense and her contriteness in accepting responsibility for her actions in this matter.

We conclude that Kern's sentence of one year of incarceration and three years suspended with probation is appropriate in light of the nature of her offense and her character. Although Kern had no prior criminal history, her attempt to sneak a schedule II narcotic to her son constitutes a serious offense and raises questions as to her character.

Affirmed.

RILEY, J., and MAY, J., concur.